



## NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

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Volume 25 | Number 2

Article 2

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Spring 2000

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### Recommended Citation

Harry Hutchison, *Evolution, Consistency, and Community: The Political, Social, and Economic Assumptions that Govern the Incorporation of Terms in British Employment Contracts*, 25 N.C. J. INT'L L. & COM. REG. 335 (1999).

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# Evolution, Consistency, and Community: The Political, Social, and Economic Assumptions that Govern the Incorporation of Terms in British Employment Contracts

## **Cover Page Footnote**

International Law; Commercial Law; Law

# **Evolution, Consistency, and Community: The Political, Social, and Economic Assumptions that Govern the Incorporation of Terms in British Employment Contracts**

*Harry Hutchison*<sup>1</sup>

## **I. Introduction**

In Great Britain, as in the United States, entering an employment relationship requires some form of agreement generally referred to as the “contract of employment.”<sup>2</sup> British law focuses on the existence of an individual contract of employment that, regardless of union representation, governs the degree to which a collective bargaining agreement will be incorporated into the individual employment relationship. While both jurisdictions provide employee protection against discrimination based on race, sex, and disability, British workers are subject to broader and more comprehensive national legislation. This expanded protection provides British workers with, among other things, both statutory<sup>3</sup>

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<sup>2</sup> In Britain, a contract of employment is often called a “contract of service,” which is distinguishable from a “contract for services.” *See, e.g.,* N. M. SELWYN, *SELWYN’S LAW OF EMPLOYMENT* 46 (1996). A “contract for services” generally refers to self-employed individuals or independent contractors who work personally for another under a “contract of service.” *See id.* While this distinction seems relatively easy to state, in practice it has proved difficult to draw. Courts and employment Tribunals have developed and employed a number of different tests and standards designed to enforce this distinction. *See generally id.* at 46-68 (describing several such tests and standards); *see also* SIMON DEAKIN & GILLIAN MORRIS, *LABOUR LAW* 149-68 (1998) [hereinafter *DEAKIN & MORRIS*] (analyzing a number of different tests); M. R. FREEDLAND, *THE CONTRACT OF EMPLOYMENT* (1976) (providing a historical overview of the issues surrounding contracts of employment).

<sup>3</sup> *See* Employment Rights Act 1996, ch. 18, part X (Eng.), *reprinted in* 16 *HALSBURY’S STATUTES OF ENGLAND AND WALES* 649 (4th ed. 1997) (regarding unfair

and common law<sup>4</sup> protection against unfair dismissal and statutory protection against layoffs<sup>5</sup> and arbitrary discipline.<sup>6</sup> The relatively recent creation of such statutory and judge-made constraints on employer freedom hints at new and perhaps communitarian assumptions that may guide future employment decisions. These developments validate the claim that "[r]elations between employers and employed have indeed developed and are still developing; and their development invites continuous reconsideration by the courts of rules worked out in different conditions."<sup>7</sup> Now, more than twenty years after *Chappel v. Times Newspapers*, the content of employment contracts continues to change in dramatic ways.<sup>8</sup>

Despite changes in the employment arena and reconsideration by courts, most forms of employee protection must still be preceded by a determination that a contract of employment actually exists.<sup>9</sup> Once a contract of employment has been established, the next step is to determine the implication of the pertinent terms and conditions of the contract.<sup>10</sup> Consequently,

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dismissal). Under British law as it existed before 1971, "an employer was entitled to dismiss an employee for any reason or for no reason at all." SELWYN, *supra* note 2, at 324.

<sup>4</sup> Usually, British workers receive limited protection against termination that is equivalent to a dismissal at common law. See, e.g., DEAKIN & MORRIS, *supra* note 2, at 396-97. Common law dismissals include (1) a dismissal with notice; (2) a dismissal for fundamental breach (*i.e.*, misconduct); and (3) wrongful dismissal. See generally *id.* at 396-438 (discussing wrongful dismissal). The actual contract terms may be important in determining whether there has been a breach of the notice term, whether the termination is grounded in a fundamental breach, or whether the dismissal is in fact wrongful. See *id.* at 396-438; see also SELWYN, *supra* note 2, at 324-28.

<sup>5</sup> See Employment Rights Act 1996, ch. 18, part XI (Eng.), reprinted in 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 696 (4th ed. 1997) (regarding redundancy payments).

<sup>6</sup> See Employment Rights Act 1996, ch. 18, part II (Eng.), reprinted in 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 576 (4th ed. 1997) (providing for protection of wages against deductions); Employment Rights Act 1996, ch. 18, part IV (Eng.), reprinted in 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 596 (4th ed. 1997) (regarding protected shop workers and betting workers with respect to Sunday work).

<sup>7</sup> *Chappell v. Times Newspapers*, 1 W.L.R. 482, 503 (Stephenson, L.J. 1975).

<sup>8</sup> See Douglas Brodie, *Commentary: Specific Performance and Employment Contracts* 27 INDUS. L. J. 37, 37 (1998).

<sup>9</sup> See, e.g., SELWYN, *supra* note 2, at 69-74; FREEDLAND, *supra* note 2, at 8-11.

<sup>10</sup> As Selwyn notes, "[i]t is usual to speak of the 'terms and conditions of

employees who may have suffered a detriment at the hands of their employer or employers seeking guidance on the extent of their prerogative powers will focus on the underlying assumptions that govern the incorporation of contract terms.

Standard economic analysis of the law emphasizes the importance of voluntary exchange in maximizing the efficiency of resource transfer from less to more valuable uses.<sup>11</sup> According to this view, value-maximizing transactions occur within the contours of a process of exchange, which functions reliably under agreed upon terms.<sup>12</sup> While this hypothesis is attractive in theory, the reality of the employment relationship can be quite different and more complex. Realistically, all of the circumstances that may arise from the express terms of an employment contract cannot be efficiently forecast under a transaction-cost analysis at the time the employment relationship commences.<sup>13</sup> For example, employees strictly complying with the express terms of a collective agreement forbidding overtime may not anticipate a court directive compelling them to desist from such compliance.<sup>14</sup>

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employment' which are part of every contract of employment, although no attempt ever appears to have been made to define . . . this expression." SELWYN, *supra* note 2, at 74. It has been argued by some that the terms of employment are bilateral; that is, they are part of the agreement between the employer and the employee. *See, e.g., id.* On the other hand, conditions of employment have been interpreted as unilateral instructions set forth by the employer. *See id.* If this latter line of reasoning is correct, then changes in employment terms can only occur after express or implied agreement to that effect, whereas the employer can change a condition unilaterally at anytime. *See id.*

<sup>11</sup> *See* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 101(1998).

<sup>12</sup> *See id.*

<sup>13</sup> *See* DEAKIN & MORRIS, *supra* note 2, at 237. Employment relationships can be conceived as a form of bilateral monopoly. *See* POSNER, *supra* note 11, at 274. Bilateral monopolies tend to increase transaction costs and the law may attempt to reduce such costs—here, by not requiring that all the terms be specified before the relationship commences. *See id.* In addition, one observer contends that because an employer commands superior resources such as capital and information, while ordinary employees lack the time and resources to choose between offers of employment and to haggle over terms, government acceptance of employee subordination extends beyond merely pecuniary forms. *See* Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 *INDUS. L.J.* 1 (1986). Usually, consent of the parties is viewed as legitimizing any subordination created by the contractual obligation. *See id.* Implicit in such consent is the notion that the employment contract empowers management to direct the work of employees. *See id.*

<sup>14</sup> *See, e.g., Secretary of State for Employment v. ASLEF (No. 2)*, 2 All E.R. 949 (Q.B. 1972) (holding employees in breach of contract where the court deemed the union's strict compliance to a no-overtime provision violated the duty to serve employer

Moreover, express reference to collective agreements or other external sources often incorporates a number of terms that generally are not bargained for individually.<sup>15</sup> The inclusion of express terms, like the inclusion of implied terms, is subject to various common law rules.<sup>16</sup>

The process by which terms are incorporated can have decisive and perhaps catastrophic consequences for one or both of the parties to the agreement. While this article refers to the specifics of this process, such references are not intended to be exhaustive. Indeed, the primary objective of this article remains limited to: (1) a modest investigation of the emerging academic and judicial scholarship concerning the assumptions that govern the bases on which terms are incorporated into the contract of employment in Great Britain;<sup>17</sup> and (2) an investigation of whether those assumptions recognize that equality of bargaining can no longer be assumed to exist, and that deference to management prerogatives can therefore no longer be perpetually justified.<sup>18</sup>

Perhaps the most important evidence demonstrating the change in the common law and the assumptions that undergird it lies in the evolution of the obligation of mutual trust and confidence brought on by a changing legal culture.<sup>19</sup> According to one observer, the implied obligation of mutual trust and confidence is grounded on a "judicial vision of the workplace as a

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faithfully). Regarding that decision, one observer states:

If the rulebook, by which they were working, was a part of their contracts of employment, then, by adhering to it . . . they could hardly be said to be breaking their contracts. However, one of the rules stated that employees should 'make every effort to facilitate the working of trains and prevent unavoidable delay', which would clearly prohibit any deliberate attempt to interpret the rules in such a way as to achieve disruption of services.

SELWYN, *supra* note 2, at 91-92; *see also*, DEAKIN & MORRIS, *supra* note 2, at 237.

<sup>15</sup> *See* DEAKIN & MORRIS, *supra* note 2, at 237.

<sup>16</sup> Courts often consider whether a specific term is procedural or substantive, whether the disputed term is appropriate for inclusion, and whether the parties intended that the term be incorporated. *See generally*, DEAKIN & MORRIS, *supra* note 2, at 258-77 (discussing interpretation of employment contracts).

<sup>17</sup> *See infra* notes 26-115 and accompanying text.

<sup>18</sup> *See infra* notes 116-31 and accompanying text.

<sup>19</sup> *See* Brodie, *supra* note 8, at 44; *see also*, PHILIP SELZNICK, THE MORAL COMMONWEALTH 362 (1992) (discussing the legal evolution of the obligation of mutual trust and confidence).

community.”<sup>20</sup> If this view is correct, it constitutes a migration from the principle of limited obligation in favor of more diffuse and open-ended duties, in which the realities of association may compel *unequal* contributions rather than carefully measured reciprocity.<sup>21</sup> This evolution constitutes a true challenge to the ideological basis of the contract at will.<sup>22</sup>

Part II develops an analytical basis of contract incorporation by examining express, implied, and external incorporation as well as the assumptions that underlie this process.<sup>23</sup> Part III examines one of Britain’s most significant employment cases, which signaled that the previously dominant assumptions governing the incorporation of contract terms are now under review.<sup>24</sup> This article will also address the most important of those changes: the emerging communitarian view that workers’ interests range beyond merely financial concerns and that deference to management is no longer the status quo.<sup>25</sup>

## II. The Basis of Incorporation

### A. *Incorporation of Express Terms, External Express Terms, and Implied Terms*

In Britain, the express terms agreed to by the parties to an employment contract do not conclusively define the boundaries of the final employment agreement,<sup>26</sup> making it unclear precisely where the express contract terms end and management prerogative begins.<sup>27</sup> Whether agreed to through individual negotiation or incorporated by reference to an external source such as a collective agreement, express terms produce legal obligations for which each

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<sup>20</sup> Brodie, *supra* note 8, at 44. See generally MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998) (providing an introduction to communitarian theory); BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 104-107 (1999) (providing same).

<sup>21</sup> See Selznick, *supra* note 19, at 362.

<sup>22</sup> See generally Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

<sup>23</sup> See *infra* notes 26-115 and accompanying text.

<sup>24</sup> See *infra* notes 116-31 and accompanying text.

<sup>25</sup> See *infra* notes 122-38 and accompanying text.

<sup>26</sup> See DEAKIN & MORRIS, *supra* note 2, at 236.

<sup>27</sup> See *id.* at 237.

party may be held accountable.<sup>28</sup> Such contracts usually contain an element of incompleteness, however, due to the impossibility of anticipating all future events.<sup>29</sup> Granting the employer unilateral rights can be seen as the common law's preferred solution to contract incompleteness.<sup>30</sup> Such unilateral power, however, is subject to reasonable limits. For instance, a city council could not unilaterally alter the working hours of schoolteachers, although it could require that teachers cover for absent colleagues.<sup>31</sup> Provided an employer's request remains reasonable and not contrary to the express terms of the agreement made between the parties, courts will allow such modifications.<sup>32</sup> This perspective underscores the more general conclusion that the "employee agrees to *serve* in return for wages, rather than undertaking to provide a particular service or product within which his or her labour is embodied."<sup>33</sup>

Concepts underlying British common law traditionally recognize the idea that employers possess prerogative powers beyond the scope of the express terms of the contract and that employees must conform to an obligation of obedience.<sup>34</sup> Furthermore, that same body of law supports the employer's implied power to lay down certain norms for the performance of work, which do not necessarily take the form of contract terms. Significantly, such implied conditions may include any bridging terms that give effect to the normative contents of collective agreements and become part of the express agreement between the parties.<sup>35</sup> While these implied terms provide support for

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<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 236-37.

<sup>31</sup> *See id.* at 238 (citing *Sim v. Rotherham Metro Borough Council*, 3 W.L.R. 851 (Ch. 1986)). While the teachers' contract was silent about whether they had an obligation to provide cover, school teachers are members of a profession and a professional contract would not normally be expected to detail the professional obligations under the contract. *See Sim*, [1986] 3 W.L.R. at 862. Their obligations would instead be defined by the nature of their professions. *See id.*

<sup>32</sup> *See DEAKIN & MORRIS, supra* note 2, at 238.

<sup>33</sup> *Id.* at 237.

<sup>34</sup> *See id.* More precisely, workers agree to provide labor at the direction of the employer for a period of time where the precise method of performance rests primarily with the employer. *See id.*

<sup>35</sup> Apart from seeking out a bridging term, courts routinely ask whether a particular term is appropriate for incorporation. *See id.* at 263-65 (citing *Anderson v. Pringle* of



managerial prerogative by expressing the employee's duties of obedience, fidelity, and care, they also protect certain employee expectations of continued employment.<sup>36</sup> Furthermore, a long-standing reciprocal duty of cooperation binds both sides of the employment contract.<sup>37</sup>

The obligations created by implied terms are diffuse and epitomize the merging of contract and status. Despite some changes since the nineteenth century, it is generally agreed that implied conditions of the employment relationship are contractual in nature.<sup>38</sup> Tests historically employed for implying or incorporating contract terms include the officious bystander test<sup>39</sup> and business efficacy test,<sup>40</sup> both of which seek to discover the unstated intentions of the parties. A third test, the legal incidents test, focuses instead on the legal underpinning of the transaction.<sup>41</sup> Consent justifies the incorporation of implied terms whether as a result of the officious bystander, business efficacy, or legal

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Scotland Ltd., [1998] IRLR 64 (a last-in, first-out provisions for redundancy selection contained in the collective bargaining agreement was incorporated into the employee's contract) and *Alexander v. Standard Tel. & Cables Ltd.* (No. 2), [1991] IRLR 296 (last-in, first-out clause deemed inappropriate for incorporation)); *see, e.g., Wandsworth LBC v. D'Silva*, [1998] IRLR 193 (sick leave policy provided only "guidance" to employers and not binding as incorporated term); *Grant v. Southwest Trains Ltd.*, [1998] IRLR 188 (employer provision for equal opportunity not incorporated as overly general despite widespread dissemination). In addition, the likelihood of incorporation and the appropriateness for incorporation of express collective agreements into the individual employment relationship may turn on whether the employer and the union have included within their agreement a statement that the terms are intended to be binding in honor only. *See DEAKIN & MORRIS, supra* note 2, at 265-66. Such a provision, along with the current presumption in British law, will likely preclude the collective agreement, or a provision within it, from taking effect with respect to the individual employment relationship. *See id.*

<sup>36</sup> *See DEAKIN & MORRIS, supra* note 2, at 238.

<sup>37</sup> *See id.*

<sup>38</sup> *See id.* at 240.

<sup>39</sup> *See id.*; *see, e.g., Shirlaw v. Southern Foundaries Ltd.*, 2 K.B. 206 (1939) (officious bystander test turns on whether issue is "so obvious as to go without saying"); *British Broadcasting Company v. Kelley-Phillips*, [1997] IRLR 571 (applying officious bystander test to determine existence of fixed-term contract).

<sup>40</sup> *See DEAKIN & MORRIS, supra* note 2, at 240; *see, e.g., Bauman v. Hulton Press Ltd.*, 2 All E.R. 1121 (Q.B. 1952) (giving business efficacy to commissions contract required that employer provide employee with reasonable amount of work during term of contract).

<sup>41</sup> *See DEAKIN & MORRIS, supra* note 2, at 241.

incidents test.<sup>42</sup> Moreover, express terms may be qualified by an implied obligation to exercise the powers they create reasonably. For instance, in the case *Johnstone v. Bloomsbury Health Authority*<sup>43</sup> at least one judge concluded that an express contractual provision requiring junior doctors to work as many as eighty-eight hours a week must be exercised reasonably in view of the possible consequences to the employee's health.<sup>44</sup> Furthermore, implied terms, when incorporated, will not always favor management.<sup>45</sup>

Sources of express terms that are external to the individual employment relationship "derive not from the parties' own agreement but, for example, from agreements involving third parties," and include statutes, collective bargaining, and custom and practice.<sup>46</sup> Statutory protections sometimes amend the terms and/or conditions of the contract of employment.<sup>47</sup> For example, the Equal Pay Act of 1970 incorporates into employment contracts a clause requiring equal treatment for men and women, regardless of whether it is expressly provided for in the contract.<sup>48</sup> Similarly, the National Minimum Wage Act of 1998 incorporates into all employment contracts a clause requiring that employers pay their employees according to the national minimum wage.<sup>49</sup> Terms may be incorporated by reference to trade usage or the custom and

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<sup>42</sup> See *id.* at 240-41.

<sup>43</sup> 2 All E.R. 293 (1991).

<sup>44</sup> See *Johnstone*, [1992] QB 333 at 350 (Browne-Wilkinson, L.J.).

<sup>45</sup> See DEAKIN & MORRIS, *supra* note 2, at 332 (citing *Malik v. BCCI*, 3 W.L.R. 95 (H.L. 1997)). The rule in *Addis v. Gramophone Co.*, [1909] AC 488, decided that an employee could not recover damages for injured feelings. By contrast *Malik* takes a view premised on an implied mutual obligation of trust and confidence. See DEAKIN & MORRIS, *supra* note 2, at 333-34. Accordingly, damages to an employee's reputation are recoverable. See *id.* at 334; see also Douglas Brodie, *A Fair Deal at Work*, 19 OXFORD J. OF LEGAL STUD. 83 (1999) [hereinafter, Brodie *A Fair Deal at Work*]. For an argument that would preclude the parties from contracting out of their mutual obligation see Douglas Brodie, *Beyond Exchange: The New Contract of Employment*, 27 INDUS. L.J. 79 (1998) [hereinafter Brodie, *Beyond Exchange*].

<sup>46</sup> DEAKIN & MORRIS, *supra* note 2, at 235.

<sup>47</sup> See *id.* at 244. Traditionally courts seem to regard most types of protective legislation as imposing extra-contractual obligations on employers. See *id.* at 245.

<sup>48</sup> The Equal Pay Act 1970, ch. 41, § 1 (Eng.), reprinted in 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 35 (4th ed. 1997).

<sup>49</sup> The National Minimum Wage Act 1998, ch. 39, § 1 (Eng.), reprinted in 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 54 (Current Statutes Service).

practice of the plant or workplace, especially where the parties implicitly contract on the assumption that informal norms would apply.<sup>50</sup> Work-rules may or may not have contractual effect.<sup>51</sup> They may be incorporated through a bridging term in the individual contract or by way of analogy to custom and practice.<sup>52</sup> Similar rules apply to the incorporation of collective agreements.<sup>53</sup>

### *B. Assumptions*

The varied and, at times, elusive assumptions that seem to dominate decisions concerning the incorporation of terms can be examined by surveying: (1) contract incompleteness and the grant of unilateral rights of direction to the employer; (2) the interplay of managerial prerogatives and the courts' determination of implied terms in deference to management; (3) the interpretation of statutory provisions—especially concerning unfair dismissal—granting deference to management; (4) the status of the rulebook and work-rules incorporated through bridging terms or by analogy to custom derived at least, in part, from the ideology of master-servant; and (5) the collective bargaining agreement and the joint selection of the rulebook grounded in notions of voluntarism, equality of bargaining, and autonomy from government influence.

One enduring assumption is the notion that individual workers possess the same economic, social, and political power as that possessed by employers.<sup>54</sup> The reality can be quite different. Rigid adherence to traditional contract approaches and the “archetypal models of master and servant” sustain notions of subordination.<sup>55</sup> An inherent tension exists between the social demands of the employment relationship and the spirit of the common law, which is inspired by a belief in the equality—real or fictitious—of individuals.<sup>56</sup> The unilateral power that employment

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<sup>50</sup> See DEAKIN & MORRIS, *supra* note 2, at 266-67.

<sup>51</sup> See *id.* at 268; see also *infra* notes 64-72 and accompanying text.

<sup>52</sup> See DEAKIN & MORRIS, *supra* note 2, at 268-69; see also *infra* notes 107-08 and accompanying text.

<sup>53</sup> See DEAKIN & MORRIS, *supra* note 2, at 268-69.

<sup>54</sup> See LORD KENNETH WILLIAM WEDDERBURN, *LABOUR LAW AND FREEDOM: FURTHER ESSAYS IN LABOUR LAW* 111 (1995).

<sup>55</sup> See *id.*

<sup>56</sup> See PAUL DAVIES & MARK FREEDLAND, *LABOUR LEGISLATION AND PUBLIC POLICY* 13 (1995); see also Collins, *supra* note 13, at 1. Collins observes, “[c]ontracts

contracts grant employers to direct employees' work remains an important assumption that underlies the incorporation of terms within the employment contract. In practice, this requires the employee to give her first allegiance to the employer, perhaps at the cost of her own job security.<sup>57</sup> This grant of direction to employers is not, however, open-ended. For example, if an employer permits sexual harassment, it breaches the requirement of mutual cooperation.<sup>58</sup> Nonetheless, judicial deference to a managerial prerogative power that lies beyond the express terms of the contract belies the view that traditional contract dogma has supplanted master-servant ideology in the interpretation of employment contracts.<sup>59</sup>

It might be argued that the evolution of judicial *laissez-faire* in employment bargaining premised on the assumption of self-regulation by the parties, served to ameliorate the imbalance in bargaining power. Conversely, it has been argued that a clear understanding of employee subordination requires acceptance of the notion of its dual source, which cannot be legitimated by consent.<sup>60</sup> The dual source of worker subordination is derived from both market and bureaucratic power.<sup>61</sup> Accordingly, even where the employee enjoys improved bargaining power because of either improved collective bargaining or because she possesses a special skill, the social dimension of subordination remains vibrant.<sup>62</sup>

### *C. Doctrinal Consistency or Inconsistency?*

The failure to understand the dual source nature of worker subordination affects the incorporation of employment terms, especially when legislative power seeks to counteract *economic* power as opposed to *social* power. This oversight also allows

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engender relations of power. Normally, however, the consent of the parties legitimates any subordination created by the contractual obligations. The contract of employment confers power upon management to direct the work of employees." *Id.*

<sup>57</sup> See DEAKIN & MORRIS, *supra* note 2, at 238 (citing *Cresswell v. Board of Inland Revenue*, 2 All E.R. 713 (Ch. 1984)).

<sup>58</sup> See DEAKIN & MORRIS, *supra* note 2, at 238.

<sup>59</sup> See *id.* at 238-41.

<sup>60</sup> See Collins, *supra* note 13, at 1.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

courts to confuse the employment relationship with a contract relationship and accordingly employ contract-like terminology in adjudicating this relationship. For example, the:

[o]rdinary nexus between manager and employee cannot be described as a contractual relation, for they have never actually made a contract together. Instead, they have both agreed with a third party, usually a company . . . to join the same organisation at different points of entry in the hierarchy of ranks.<sup>63</sup>

This failure to recognize the dual source of subordination leads in Collins' view to doctrinal inconsistency. This article examines this perceptive contention in the context of (1) the status of the rulebook or employee handbook; (2) contract modification; (3) incorporation of collective agreements; (4) interpretation of statutes (unfair dismissal law); and (5) custom and practice. By doing so, this article exposes underlying assumptions, which lead to doctrinal inconsistencies.

### *1. The Status of the Rulebook*

Doctrinal inconsistency exists in British law with respect to the status of the rulebook, or employee handbook in the terminology of American employment law.<sup>64</sup> Trapped "between the conflicting considerations of interpreting the rulebook as it was intended—an exercise of the discretionary power of management for the time-being—and as a means of protecting an employee's expectations, the courts vacillate in their judgements on its contractual status."<sup>65</sup> Accordingly, in *Secretary of State for Employment v. A.S.L.E.F. (No.2)*, the employer's rulebook was viewed not as setting forth contractual terms, but as a set of instructions issued under the general prerogative of management.<sup>66</sup> Thus, the court's decision

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<sup>63</sup> *Id.* at 3.

<sup>64</sup> Compare the development of British law regarding interpretation of the rulebook (also known as "works rules") to American law regarding employee handbooks. See, e.g., *Cummings v. South Portland Housing Authority*, 985 F.2d 1 (1st Cir. 1993) (handbooks containing standards of behavior create just cause standard for termination); *Woolley v. Hoffman-La Roche*, 99 N.J. 10, 499 A.2d 515 (1985) (employees need not expressly rely on the terms of the handbook for terms to be binding); *Toussaint v. Blue Cross and Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980) (employers bound by handbook terms based on benefit of orderly workplace provided by manual).

<sup>65</sup> Collins, *supra* note 13, at 4.

<sup>66</sup> See *Secretary of State for Employment v. A.S.L.E.F. (No.2)*, 2 W.L.R. 1362 (Q.B. 1972).

that a "work-to-rule" practice was in fact a breach of contract followed closely on this vision of the rulebook.<sup>67</sup> This approach endorses the perception that "rule-books constitute a temporary exercise of managerial prerogative, which can always be amended or supplemented by further instructions."<sup>68</sup> The court in *R. v. East Berkshire Area Health Authority, ex parte Walsh*,<sup>69</sup> however, reached a different conclusion. There, the court treated certain regulations contained in the rulebook as terms of the contract of employment, thereby avoiding judicial review and limiting the applicant to a cause of action in private law.<sup>70</sup> Hence, a sharp conflict exists between the view that the rulebook comprises a discretionary exercise of managerial power on the one hand, and on the other hand, regarding it as a contractual document, which affords individual rights.<sup>71</sup> Both decisions highlight the prominence of deference to traditional managerial prerogatives and limitations on judicial intervention on behalf of subordinate workers.<sup>72</sup>

## 2. Contract Modification

Cataloging what political, social, and economic assumptions govern the incorporation of terms through the above analysis illuminates contract modification after formation. While a strict contractual approach would require a fresh agreement, in practice, the employer simply issues fresh directions or employees unilaterally commence new tasks or abandon old ones.<sup>73</sup> The courts, perhaps incoherently, circumvent the requirement of express agreement for modification by interpreting the contract of employment by reference to subsequent conduct.<sup>74</sup> By doing so,

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<sup>67</sup> See Collins, *supra* note 13, at 4.

<sup>68</sup> *Id.* at 5.

<sup>69</sup> 3 W.L.R. 818 (C.A. 1985).

<sup>70</sup> See *East Berkshire Area Health Authority*, [1985] 3 W.L.R. at 827.

<sup>71</sup> See Collins, *supra* note 13, at 5.

<sup>72</sup> See, e.g., *Cresswell v. Board of Inland Revenue*, 2 All E.R. 713 (Ch. 1984) (implied obligation for employees to adapt to new methods sustained as an operative incorporated contract term).

<sup>73</sup> See Collins, *supra* note 13, at 8.

<sup>74</sup> See O. Kahn-Freund, *Legal Framework*, THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN 58-9 (A. Flanders & H. Clegg, eds., 1954); see also Collins, *supra* note 13, at 8; see, e.g., *Howman & Son v. Blyth*, [1983] I.C.R. 416 (national working

the courts implicitly accept worker subordination while entertaining the fiction that parties with equal bargaining power formed the contract.

### *3. Incorporation of Terms of the Collective Bargaining Agreement*

One question that has arisen with great frequency, and to which differing answers have been given, lies in whether an individual's contract of employment incorporates terms of a collective bargaining agreement. Much ink has been spilt over the notion of the appropriateness of terms for incorporation, with substantive terms viewed as more easily incorporated than procedural ones.<sup>75</sup>

In *Anderson v. Pringle of Scotland, Ltd.*,<sup>76</sup> the terms of a collective bargaining agreement were incorporated despite the employer's contention that it was inapplicable. In 1986, Pringle of Scotland entered into a collective agreement with the GMB trade union, part of which concerned redundancy procedures, including termination procedures based on length of service—"first in, last out".<sup>77</sup> However, the agreement expressly provided that this term was not to be legally enforceable.<sup>78</sup> When Pringle of Scotland chose to terminate 290 employees based on a selectivity scheme not agreed to by either Anderson or the GMB trade union, Anderson contested his termination.<sup>79</sup> The court held that despite the express contrary provision, the "first in, last out" term of the collective agreement bound the employer.<sup>80</sup> The holding in *Anderson* bars the claim of management prerogative in selecting employees for redundancy and protects the position of employees generally.

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rule prima facie evidence of incorporation of terms); *Joel v. Cammell Laird (Ship-repairers), Ltd.*, 4 I.T.R. 206 (1969) (collective bargaining agreement incorporated where both parties conscious of trade union affairs). *But see* *Dudfield v. Ministry of Works*, 108 Sol. J. 118 (1964) (pay increase provision subject to ministry approval not automatically included).

<sup>75</sup> See DEAKIN & MORRIS, *supra* note 2, at 263-65.

<sup>76</sup> 1998 IRLR 64 (Court of Session, November 19, 1997) (LEXIS, Enggen Library, Cases File).

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

In *Alexander v. Standard Telephone & Cables (No. 2)*,<sup>81</sup> however, the court declined to incorporate the terms of a collective agreement under similar circumstances. There, Standard Telephone employed workers under the terms of collective agreements negotiated with various unions, which provided that selection for redundancy would be on the basis of service, with supplementary provisions relating to the maintenance of a balance of skills among the workforce.<sup>82</sup> Workers filed for an injunction when they were terminated based on redundancy, rather than under a length of service policy.<sup>83</sup> The court held that the length of service term, the "first in, last out" provision of the collective bargaining agreement, had not been expressly included and therefore was not binding on the employer.<sup>84</sup>

While these two decisions might be difficult to reconcile, *Anderson v. Pringle of Scotland, Ltd.* suggests greater concern for employee vulnerability in a way that highlights the growing concern of courts and commentators for protecting the expectations of employees.<sup>85</sup> In fact, since the collective agreement acts principally to alter the terms of the code (rulebook) governing the workplace, one observer states that an employment relationship derived at least in part from a collective agreement, should only be modified by proof that the employer has exercised its power reasonably.<sup>86</sup> If the rulebook is simply an exercise of private bureaucratic power, then there is no need to incorporate the terms of the collective agreement into the contract of employment. In reality, however, collective bargaining exists as a form of *joint selection of the rulebook* which emerged within the context of limited legal and expansive social rules in which employers and employees formulated their own codes of conduct and their own machinery for enforcement.<sup>87</sup> Hugh Collins further posits that employees should receive protection against changes not by virtue

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<sup>81</sup> 1991 IRLR 286 (Queen's Bench, May 24, 1991) (LEXIS, Enggen Library, Cases File).

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See, e.g.,* Peace v. Edinburgh City Council, [1999] SLT 712.

<sup>86</sup> *See* O. KAHN-FREUND, LABOUR AND THE LAW 154-66 (1983).

<sup>87</sup> *See* DAVIES & FREEDLAND, *supra* note 56, at 9; DEAKIN & MORRIS, *supra* note 2, at 75.



of absolute contractual rights, but on the principle of estoppel derived from public law.<sup>88</sup>

Although Collins' position may improve theoretical consistency, the courts have not followed his reasoning. Rather, "[t]hey insist upon the protection of the employee's interests through the ordinary law of contract, though at the cost of considerable distortion of ordinary legal principles."<sup>89</sup> The normal pattern of judicial reasoning holds "the collective agreement was incorporated into the contract of employment by express reference or by custom, but that in the event of the termination of the collective agreement or its major modification, no alteration of the individual's contract of employment takes place without his express or implied consent."<sup>90</sup>

This view *assumes* equality between both employer and employee. Yet, management generally has greater access to information, possesses superior capital, and maintains excellent access to legal advice. These factors, when taken together, reduce the opportunity costs of not hiring someone and facilitate control over the terms of the contract.<sup>91</sup> Therefore, based on these superior assets, the assumed voluntarism associated with collective bargaining likely favors management.<sup>92</sup>

#### 4. *The Interpretation of Statutes – Unfair Dismissal Law*

In both discussions of the impact of collective agreements and general contract modification, the concept of the employment relationship as a contract derives from the notion of agreement that provides legitimacy rather than of actual fairness.<sup>93</sup> On the other hand, the law of unfair dismissal aspires to bring actual fairness into the exercise of private bureaucratic power.<sup>94</sup> In practice,

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<sup>88</sup> See Collins, *supra* note 13, at 6-8.

<sup>89</sup> *Id.* at 7.

<sup>90</sup> Robertson v. British Gas Corporation [1983] I.C.R. 351 (C.A) (Court of Appeal, December 17, 1982) (LEXIS, Enggen Library, Cases File).

<sup>91</sup> See generally Collins, *supra* note 13, at 11; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); see, e.g., Lloyds Bank Ltd. v. Bundy, 3 All E.R. 757 (Q.B. 1974) (courts will analyze bargaining disparities under doctrine of undue influence).

<sup>92</sup> See Collins, *supra* note 13, at 1.

<sup>93</sup> See *id.* at 10.

<sup>94</sup> See DAVIES & FREEDLAND, *supra* note 56, at 459.

however, the courts' reliance on the concept of the contract and the embedded and related master-servant assumption impedes development of this distinction.<sup>95</sup> The pattern of granting compensation rather than reinstatement as the remedy for unfair dismissal illustrates a "preference for regarding employment as a purely economic transaction."<sup>96</sup> In contrast, viewing the relationship as involving social power, status, and dignity would justify re-instatement of the employee and thereby invalidating the abuse of private bureaucratic power.<sup>97</sup> Furthermore, the courts' overt concern with procedural as opposed to substantive fairness when applying fairness tests in the context of employee discipline reveals the assumption that every term of employment protects an economic interest.<sup>98</sup> Additionally, the "range of reasonable responses" test, which is normally employed in assessing employer action, evaluates the standard of reasonableness by customary practices in employment, not by reference to notions of fairness.<sup>99</sup> This test may reinforce prior assumptions embedded in the status quo and derived from the common law, which sustain the assertion that British unfair dismissal law, far from controlling managerial discretion and protecting the interests of employees in job security, legitimates managerial authority to regulate the labor market.<sup>100</sup>

Recently courts have declined to accord normative effect to

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<sup>95</sup> See, e.g., *Devis & Sons Ltd. v. Atkins*, [1976] ICR 196 (Q.B.) (origin of distinction between unfair dismissal as opposed to wrongful dismissal).

<sup>96</sup> Collins, *supra* note 13, at 11. See generally, HUGH COLLINS, *JUSTICE IN DISMISSAL* (1992). But see Gwyneth Pitt, *Justice in Dismissal: A Reply to Hugh Collins*, 22 INDUS. L.J. 251 (1993) (analyzing flaws in Collins' fundamental principles and discouraging reinstatement as a remedy for unfair dismissal).

<sup>97</sup> See Collins, *supra* note 13, at 11.

<sup>98</sup> See HOWARD F. GOSPEL & GILL PALMER, *BRITISH INDUSTRIAL RELATIONS* 92-116 (1993). But see COLLINS, *supra* note 96, at 70-71 (dismissing claim that workers possess ownership rights in their jobs while recognizing job security vis-à-vis compensation).

<sup>99</sup> See Collins, *supra* note 13, at 11; see, e.g., *Haddon v. Van Den Bergh Foods Ltd.*, [1999] I.L.R. 1150 (analyzing reasonableness test under the Employment Rights Act of 1996 § 98(4)); *British Leyland U.K. Ltd. v. Swift* [1981] IRLR 91 (C.A.) (analyzing employer's dismissal under reasonable employer test).

<sup>100</sup> See Hugh Collins, *Capitalist Discipline and Corporatist Law — Part II*, 11 INDUS. L. J. 170, 177 (1982).

statutory particulars of terms.<sup>101</sup> In *Jones v. Associated Tunnelling, Ltd.*,<sup>102</sup> the employment tribunal admitted evidence based on practice to indicate that the employee's mobility obligation was not as extensive as his written statement suggested.<sup>103</sup> Furthermore, many British labor provisions cannot be set aside to the detriment of the weaker party.<sup>104</sup> Moreover, new laws and recent judicial interpretations constrain the freedom of the parties to decide whether to enter into an employment relationship as well the terms that are available to them and hence available for incorporation.<sup>105</sup> Despite the veracity of this assertion, the master-servant model of employment "run[s] deep into the culture of judicial assumptions, including the interpretation of employment protection legislation"<sup>106</sup>.

### 5. Custom and Practice

Custom and practice considerations are not limited to the examination of statutory particulars and may favor either employees or management.<sup>107</sup> Courts' disinclination to allow expansive application of this approach reflects the judiciary's acceptance of the formalization of contract terms and conditions derived from employment protection legislation.<sup>108</sup> This practice

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<sup>101</sup> See DAVIES & FREEDLAND, *supra* note 56, at 279; see, e.g., Carmichael v. National Power [1999] 4 All E.R. 897 (employees not qualifying under Employment Protection Act of 1978 not entitled to written particulars); Eagland v. British Telecommunications, [1993] I.C.R. 644 (Employment Appeals Tribunal not obliged to invent terms of employment not required under Employment Protection Act of 1978); Mears v. Safecar Securities Ltd., 2 All E.R. 865 (1982) (where statutory particulars silent, industrial tribunal given jurisdiction to determine terms).

<sup>102</sup> 1981 I.R.L.R. 477 (Employment Appeal Tribunal, October 16, 1981) (LEXIS, Enggen Library, Cases File).

<sup>103</sup> See *id.*

<sup>104</sup> See Kahn-Freund, "A Note on Status and Contract in British Labour Law" at 635-6, 640-1, *reprinted in* DAVIES & FREEDLAND, *supra* note 56, at 106.

<sup>105</sup> See *id.*

<sup>106</sup> WEDDERBURN, *supra* note 54, at 111. See, e.g., North Riding Garage v. Butterwick [1967] 2 QB 56 (implied term of employee adaptation to changing methods incorporated to thwart employees' right to redundancy payments).

<sup>107</sup> See Malik v. Bank of Credit and Commerce International, SA [BCCI], 3 W.L.R. 95 (HL 1997).

<sup>108</sup> See Deakin & MORRIS, *supra* note 2, at 268. See, e.g., Bond & Neads v. CAV Ltd., [1983] I.R.L.R. 360 (holding customary right to terminate without pay surpassed by

arguably reveals the courts' acceptance of evolutionary change in not only the employment relationship, but in the assumptions which underlie it as well. Nonetheless, management, through greater access to information on custom and practice, maintains an advantage. Where custom and practice are influential arguments, this assumption may disadvantage individual workers.

### *6. Distinguishing Public from Private Law*

The incorporation of terms into the contract decision must frequently take into consideration the assumed distinction between private and public law that British courts frequently address.<sup>109</sup> Courts seem reluctant to intervene with respect to the use of private managerial power and thus fail to comprehend that the effects of private power mirror those of governmental power. Perforce, British courts accept the political assumption that private power should not be subjected to the same limits as public power. This perception is reinforced by comprehending that when the court views the arrangement of employment as purely contractual, legitimate employee expectations may be given short shrift and the only remedy available may be compensation.<sup>110</sup> When courts conceive the employment relationship as one that includes both market and bureaucratic subordination necessarily subject to regulation, they may be more inclined to incorporate the concept of natural justice. This conception allows the employee to seek and to receive equitable remedies irrespective of whether the employer possesses public or private power.<sup>111</sup> If this view is persuasive, it may help drive British labor law toward doctrinal consistency.

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collective agreements on guaranteed pay).

<sup>109</sup> See Collins, *supra* note 13, at 14. Unlike American employment law, Britain makes no formal distinction between public and private employees aside from restrictions on outside political activities. See DEAKIN AND MORRIS, *supra* note 2, at 70.

<sup>110</sup> See, e.g., R. v. East Berkshire Area Health Authority, *ex parte* Walsh, 3 W.L.R. 818 (C.A. 1985) (rights arising directly from contractual duties remain private law issues subject to compensation, while employment obligations imposed by statute are essentially public with other possible remedies).

<sup>111</sup> Natural justice as discussed here is a concept derived largely from the public law of Britain, which under limited circumstances is applicable to private employment as well. See generally DEAKIN & MORRIS, *supra* note 2, at 70-73; Collins, *supra* note 13, at 5-6. In essence, natural justice requires judicial review of the fairness of the employer's conduct. See DEAKIN & MORRIS, *supra* note 2, at 70-73.

### D. Analysis

If the foregoing examination of the dominant political, social, and economic assumptions is correct, an emerging consensus—like the consensus among critics of the American common law of employment<sup>112</sup>—implies that individuals within the employment relationship, contract or not, are subject to the “exercise of arbitrary power by persons with dominant economic [and social, if not political] position.”<sup>113</sup> The immobility of workers may exacerbate the exercise of arbitrary power by reducing choice and increasing transaction costs. Such market imperfections characterize the employment environment in Great Britain.<sup>114</sup> In response, commentators, legislators, and courts have attempted, and continue to attempt to redress this perceived imbalance in economic, social, and political power. Such a reconsideration erodes the historic deference to (1) management power; (2) contract terminology and assertions of “freedom of contract”; (3) the presumption of “equal” bargaining power in parties’ negotiation; and (4) the belief that workers are only animated by their financial interest.

The following section highlights *Malik v. Bank of Credit and Commerce International [BCCI]*,<sup>115</sup> the British case that heralded the demise of previously dominant incorporation assumptions. This case, when paired with other evidence, suggests an evolutionary acceptance in British employment law of a new communitarian perspective on the employment relationship.

## III. Malik v. Bcci and Evolutionary Change

### A. *Malik v. BCCI*

In *Malik*, two long-serving employees of a bank that collapsed as a result of a massive fraud claimed that they lost more than their jobs.<sup>116</sup> They asserted that they lost their reputation, and as a result

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<sup>112</sup> For a short introduction to the critics of the formerly ascendant common law, see Epstein, *supra* note 22, at 947-51.

<sup>113</sup> See *id.* at 949.

<sup>114</sup> See, e.g., Irwin Stelzer, *Free Markets Will Deliver the Goods If Left Alone*, THE TIMES (LONDON), December 20, 1998.

<sup>115</sup> 3 W.L.R. 95 (H.L. 1997).

<sup>116</sup> See *Malik*, [1997] 3 W.L.R. at 97.

were put at a disadvantage when seeking new employment.<sup>117</sup> Their claim contended that an implied term within the contract of employment required their employer to conduct its business in a manner that was not likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.<sup>118</sup> The House of Lords validated this novel claim holding that certain employer practices may frustrate the service of an employee and restrict his ability to obtain future employment.<sup>119</sup>

This decision, like other recent judgements, suggests that British judges are beginning to view the employment relationship from a communitarian perspective, which exposes as inadequate classical theories of contract law.<sup>120</sup> The decision in *Malik* confirms the nascent view that "the parties to the employment contract should look out for the interests of the other in a way that one would not expect in most contracts."<sup>121</sup>

The implied obligation of mutual trust and confidence which, while still new, has been incorporated into employment contracts.

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<sup>117</sup> See *id.* at 98.

<sup>118</sup> See *id.*

<sup>119</sup> See *Malik*, 3 All E.R. 1 (H.L. 1997). The court stated:

An employer was under an implied obligation that he would not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, and an employer who breached the trust and confidence term would be liable if he thereby caused continuing financial loss of a nature that was reasonably foreseeable. Thus, if it was reasonably foreseeable that conduct in breach of the trust and confidence term would prejudicially affect employees' future employment prospects and loss of that type was sustained in consequence of a breach, then in principle damages in respect of the loss would be recoverable. The trust-destroying conduct need not be directed at the employee, either individually or as part of a group, in order to attract liability, nor was it necessary that the employee must have been aware of the employer's trust-destroying conduct while he was an employee.

*Id.* at 95.

<sup>120</sup> See *Brodie*, *supra* note 8, at 45; see, e.g., *University of Nottingham v. Eyett*, 2 All E.R. 437 (Ch.D. 1999) (implied duty of trust and confidence may require employers in some cases to counsel employees on beneficial use of pension funds); *Walker v. Northumberland City Council*, 1 All E.R. 737 (Q.B. 1995) (employer must take affirmative steps to protect employees from psychological harm); *Scallly v. Southern Health Board*, 4 All E.R. 563 (H.L. 1991) (employer responsible for informing employee of inconspicuous terms contained in employment contract).

<sup>121</sup> *Brodie*, *supra* note 8, at 45.

That obligation is grounded in yet another duty—the duty of cooperation. The long-standing duty of cooperation plays a limited role in contract law as well as employment law, by protecting the rights of the parties to perform their obligations and prohibiting behavior which would render performance difficult or impossible.<sup>122</sup> On the other hand, some commentators have argued that the implied mutual obligation of trust and confidence derives its significance as the positive variant of the general obligation of cooperation.<sup>123</sup> In other words, “[t]here are . . . a significant number of cases where the employer’s right to exercise clear, express powers under the contract have been held subject to either the implied obligation of trust and confidence or to notions of reasonableness.”<sup>124</sup> As such cases grow in number, they constitute an important alteration of the general rules of contract law on the relationship of express and implied terms.<sup>125</sup> Most striking for our purposes, these cases erode the historic assumptions of (1) deference to the master-servant ideology; (2) deference to the sovereignty of contracts between parties with equal bargaining power; and (3) the judicial presumption that only economic/financial inequality and subordination characterize unequal bargaining situations.

In *Scally v. Southern Health Board*,<sup>126</sup> for example, the court required the employer to provide information about the right of employees to purchase additional years of pensionable service. The court held that under certain situations, employers may labor under an implied duty to safeguard the interests of its employees.<sup>127</sup> This interpretation erodes the traditional assumption in contract

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<sup>122</sup> See Brodie, *Beyond Exchange*, *supra* note 45, at 80. The British duty of cooperation compares to the American concept of good faith and fair dealing; *see, e.g.*, *Fortune v. NCR*, 364 N.E. 2d 1251 (Mass. 1977) (performance of employment contracts terminable at will contain requirement of good faith and fair dealing); RESTATEMENT OF CONTRACTS (SECOND) § 205 (1981) (“[E]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

<sup>123</sup> See Brodie, *Beyond Exchange*, *supra* note 45, at 81.

<sup>124</sup> *Id.*; *see, e.g.*, *McLory v. The Post Office*, 1 All E.R. 457 (1993) (employer bound to act reasonably in effecting termination); *United Bank v. Akhtar*, [1989] I.R.L.R. 507 (employers must exercise reasonable discretion in requiring employee to transfer under the employment contract).

<sup>125</sup> See Brodie, *Beyond Exchange*, *supra* note 45, at 81.

<sup>126</sup> 3 W.L.R. 778 (H.L. 1991).

<sup>127</sup> See *Scally*, [1991] 3 W.L.R. at 787-89.

that both parties, and especially employees, are always capable of looking out for themselves. In addition, *Scally* implies that consent to particular terms is no longer sufficient to legitimate the subordination of the individual to the interests of the firm. Furthermore, this decision recognizes the fiction that consent derives from agreement between parties who possess the same economic, social, or political power. Accordingly, this decision, like *Malik*, confirms an evolution in the assumptions and law governing employment relations in the United Kingdom and seems to move Britain in a communitarian direction.

Additional illustrations of this pattern of change may be found within the statutory arena. Britain introduced its first comprehensive Minimum Wage Act<sup>128</sup> and its first Working Time Directive<sup>129</sup> in 1998. These statutory measures limited compensatory damages available in unfair dismissal actions as well as discrimination suits<sup>130</sup> and expanded the compensation available for unfair discharge actions.<sup>131</sup> As the verdicts in *Malik*, *Scally*, *Johnstone*, and other recent cases imply, judges, courts, and employment tribunals are re-evaluating their historic deference to management prerogatives by both insisting that such prerogatives be exercised reasonably and by asserting that implied obligations can protect individual employees as well as employers.

Taken together, these developments suggest that those academic commentators who have historically challenged

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<sup>128</sup> National Minimum Wage Act 1998, c.39 (Eng.) *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 54 (Current Statutes Service).

<sup>129</sup> Employment Rights Act 1996, ch. 18, part XI (Eng.), *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 557 (4th ed. 1997) *as amended by* Working Time Regulations, 1998, SI 1998 No. 1833, reg. 31 (Eng.).

<sup>130</sup> *See* The National Minimum Wage Act 1998, ch. 39, § 1 (Eng.), *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 54 (Current Statutes Service); Working Time Regulations, 1998, SI 1998 No. 1833, reg. 31 (Eng.); Sex Discrimination and Equal Pay (Remedies) Regulations 1993, SI 1993 No. 2798 (Eng.). Until 1993, the legislation for sex discrimination applied an upper limit on the amount of compensation available—the upper limit on both sex discrimination and race discrimination was latter abolished. *See also* DEAKIN & MORRIS, *supra* note 2, at 621-22.

<sup>131</sup> Amendments to the Employment Rights Act 1996 contained in the Employment Relations Bill 1999 state that the sum specified in section 124(1) of the Employment Relations Act 1996, as the limit for compensation for unfair dismissal, shall be raised to £50,000 effective in 1999. *See* Employment Relations Act 1999, c.26, § 34(4) (Eng.) (July 27, 1999) (LEXIS, Country & Region Library, UK Legislation and Regulations File).



deference to management and argued for the equal regulation of both governmental and private power have been heard. As such, the previously unchallenged logic of the common law, with its embedded assumptions and bias against workers, no longer enjoys a hegemonic position.

#### IV. Conclusion

Any attempt to discover the political, social, and economic assumptions governing incorporation is fraught with risk. First, consent is, or at the very least has been, assumed to legitimate subordination.<sup>132</sup> Second, the level of worker subordination has consistently and historically been assumed—when it is considered at all—to consist primarily of economic subordination.<sup>133</sup> Thus, courts, hampered perhaps by the political power of hierarchies, discount the employer's social power and accordingly, undercut the protective value of legislation.<sup>134</sup> Furthermore, courts may overemphasize the value of custom and practice by deferring to management, which vindicates the master-servant ideology.<sup>135</sup> Third, labor and social legislation, increasingly seen as an external constraint on the freedom of contract, even where it does not take the form of a contract term, may restrict contractual autonomy and restore contractual reciprocity by placing limits on managerial prerogatives.<sup>136</sup> This development, along with the creation of judge-made communitarian duties, implies that complete deference to managerial prerogatives is no longer warranted. Last, the history of the evolutionary changes in the employment relationship has raised the profile of the tension between the ideal of freedom and the domination of workers<sup>137</sup> as well as some of the modest efforts to deal with it. Such an approach will likely enhance the vitality of efforts which emphasize the public, regulatory character of labor law whilst resisting a rigid focus on the rights of the parties. Whether such an approach truly benefits

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<sup>132</sup> See *supra* notes 63-92 and accompanying text.

<sup>133</sup> See *supra* notes 93-106 and accompanying text.

<sup>134</sup> See *supra* notes 54-62 and accompanying text.

<sup>135</sup> See *supra* notes 107-08 and accompanying text.

<sup>136</sup> See *supra* notes 46-53, 104-05 and accompanying text; see also DEAKIN & MORRIS, *supra* note 2, at 235-236.

<sup>137</sup> See Collins, *supra* note 100, at 78.

British workers is beyond the scope of this enterprise. Whatever its benefits, Britain's current emphasis on communitarian approaches to contract law may or may not be transferable to the United States. Given America's insistence on rights<sup>138</sup> and its historic and continued commitment to individualism, it is far from clear that the United States is ready or should be ready to embrace such a communitarian perspective.

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<sup>138</sup> One distinguished observer rather elegantly asserts that freedom of contract tends to advance individual autonomy and promote the efficient operation of the labor market. See Epstein, *supra* note 22, at 951. Furthermore, he argues that freedom of contract is an end in itself. See *id.* at 953.